

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-363

TITLE NEW YORK, Petitioner V. P.J. VIDEO, INC., dba
NETWORK VIDEO, ET AL.

PLACE Washington, D. C.

DATE March 4, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK, :

Petitioner, :

V. : No. 85-363

P. J. VIDEO, INC., dba NETWORK :

VIDEO, ET AL. :

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Washington, D.C.

Tuesday, March 4, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:07 o'clock a.m.

APPEARANCES:

JOHN J. DeFRANKS, ESQ., Assistant District Attorney of
Erie County, New York, Buffalo, New York; on behalf of
the petitioner.

PAUL JOHN CAMBIRA, JR., ESQ., Buffalo, New York; on
behalf of the respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

JOHN J. DeFRANKS, ESQ.

on behalf of the petitioner,

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PAUL JOHN CAMBRIA, ESQ.

on behalf of the respondent

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JOHN J. DeFRANKS, ESQ.

on behalf of the petitioner -- rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. DeFranks, I think
3 you may proceed whenever you are ready.

4 ORAL ARGUMENT OF JOHN J. DeFRANKS, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. DeFRANKS: Mr. Chief Justice, and may it
7 please the Court:

8 The present case on a writ of certiorari to
9 the New York Court of Appeals involves the warrant
10 seizure of 13 videocassette recordings including eight
11 titles alleged to be obscene under New York's obscenity
12 law.

13 The issue as we see it, before this Court, is
14 twofold: firstly, whether the New York Court of Appeals
15 has elevated the standard of proof necessary to support
16 the evidentiary seizure of presumptively protected
17 material, and secondly, whether the Constitution of the
18 United States requires such an elevation in light of the
19 circumstances of the present case and the available
20 First Amendment safeguards.

21 Now, although it is here disputed, I think the
22 record provides firm support for our contention that the
23 standard has in fact been elevated. In the words of the
24 majority, there must be enough proof before the
25 Magistrate to allow him to judge the obscenity of the

1 films and to determine that they are not entitled to
2 constitutional protection.

3 QUESTION: And you think that's the function
4 of the jury in the trial of the case?

5 MR. DeFRANKS: Yes, sir. It was more than
6 imprecise language on the part of the Court of Appeals,
7 and this is clear upon reading the dissent. In the
8 third paragraph of the dissenting opinions he points out
9 to the majority that they have required an unambiguous
10 demonstration of obscenity in order to support the
11 present seizure. He advised them that the standard has
12 been universally rejected by the courts of the United
13 States.

14 The majority responds in footnote 3, not to
15 deny the elevated standard but in essence to confirm it,
16 chiding the dissent for not having provided any case
17 authority for his claim of universal rejection.

18 The dissenter took four more opportunities to
19 point out to the majority that they have elevated the
20 standard of proof. All four references were ignored.
21 They certainly were not denied.

22 QUESTION: Mr. DeFrank, do we have to read the
23 dissent to understand the majority opinion, do you think?

24 MR. DeFRANKS: No, I don't believe you have
25 to, but the dissent makes it very clear. The majority

1 speaks for itself on the unequivocal standard where they
2 say, we look at this information and we can see it being
3 inculpatory, or another interpretation where it may be
4 less inculpatory. So, the majority makes clear what
5 they are doing.

6 In its legal analysis the Court of Appeals
7 committed a fatal flaw which probably resulted in the
8 elevated standard. They relied upon the scrupulous
9 exactitude requirement of Stanford to raise the standard
10 of proof, yet in this case the Magistrate made the
11 probable cause determination. He designated only
12 certain films for seizure, and only those films were
13 taken.

14 Further, the term "scrupulous exactitude"
15 seems to be contradictory to the term "probable cause."
16 How can we ever be exact about what supposedly is
17 probable, and that was the question the Court of Appeals
18 was determining.

19 More importantly, the Court of Appeals aired
20 in applying a prior restraint analysis to this case. No
21 prior restraint was demonstrated. No substantial
22 restraint was demonstrated. And in fact, the record
23 indicates that there were available safeguards to
24 prevent any type of substantial restraint.

25 QUESTION: When you're talking about

1 substantial restraint, Mr. DeFranks, you're talking
2 about seizing of all the copies of a magazine or
3 something like that?

4 MR. DeFRANKS: Or even one, if it's the only
5 offering of a movie theater, I would suggest, that might
6 well be a substantial restraint, if it's not replaceable.

7 QUESTION: There's some suggestion in
8 respondent's brief, that could have been the case here,
9 that this was the only copy?

10 MR. DeFRANKS: Indeed, 85 days after the
11 seizure there was an assertion that, "these were our
12 only copies." There was no demonstration, though, that
13 they couldn't have been replaced, that others could not
14 have been made available through the distributor.

15 These videocassettes are mass production
16 items. They come in mass produced boxes with
17 descriptions and pictures on the outside. It's clear
18 they're not unique. We are not talking about a
19 first-run film, in this particular case.

20 It's important to note that no injunction or
21 order against further dissemination was ever
22 contemplated, nor was an order of destruction ever
23 contemplated in this case.

24 QUESTION: Well, what -- the circumstances
25 here, it's a business that rents out videotapes?

1 MR. DeFRANKS: Yes, Your Honor.

2 QUESTION: And if the State were to seize
3 under the warrant, in fact the only copy of the
4 videotape in such a business for a particular film, is
5 there an obligation on the part of the State to provide
6 a hearing?

7 MR. DeFRANKS: There's an obligation not only
8 to provide a hearing, adversarial under Heller, but
9 there's an obligation to allow him to copy it. If the
10 copying process is not good enough, we must return to
11 him the original.

12 QUESTION: Well, does the State have to offer
13 that in the first instance and find out whether that's
14 the case, or not?

15 MR. DeFRANKS: It was determined under Heller
16 that there need not be a pre-seizure adversarial
17 hearing. I believe it was also determined in Heller
18 that he's entitled to a post-seizure adversarial hearing
19 upon his request.

20 QUESTION: So, the burden is on the business
21 owner to request it?

22 MR. DeFRANKS: Yes.

23 QUESTION: Which was not done?

24 MR. DeFRANKS: Was not done, and I submit the
25 burden --

1 QUESTION: If it had been done, copies would
2 have been made?

3 MR. DeFRANKS: Copies would have been made, of
4 course. Copies would have been made.

5 QUESTION: If he wanted them?

6 MR. DeFRANKS: In preparation for trial he
7 requested, 30 days after the seizure, inspection and/or
8 copying to prepare for trial. It had nothing whatsoever
9 to do with continued dissemination. Of course, it came
10 some time after the seizure.

11 We responded by saying, what you want, if you
12 want inspection you're welcome to come and inspect it
13 any time you want. But he never, upon our response,
14 said, "Well, I have to have copies to disseminate, to
15 provide the public with access to these materials."

16 So, we submit that under Heller he has not
17 demonstrated a substantial restraint.

18 QUESTION: If there was only one copy in the
19 first place, I suppose all you're obligated to do is to
20 get that back to him. You make a copy for yourself and
21 give them one copy back?

22 MR. DeFRANKS: That's indeed what Heller says,
23 and we would have been compelled to do so.

24 QUESTION: Mr. DeFranks, you think that in --
25 for a warrant to be proper that there has to be

1 established probable cause, that every element of the
2 crime has been committed, or something less than that?

3 MR. DeFRANKS: For the warrant to be
4 sufficient, I would contend that the affiant should
5 indicate that he's reviewed the entire film. He should
6 attempt to describe --

7 QUESTION: Just answer the question, please.
8 Does every element of the crime have to be supported by
9 probable cause?

10 MR. DeFRANKS: At least an inference. You
11 should be able to draw from the evidence an inference as
12 to each element, the three-prong test.

13 QUESTION: And I guess the argument here
14 focuses on whether in fact all the elements of this
15 offense have been met?

16 MR. DeFRANKS: Yes, and I would submit that
17 they have.

18 QUESTION: By inference?

19 MR. DeFRANKS: By inference, yes.

20 With respect to the safeguards, I did want to
21 point out one more safeguard because it goes to the
22 question of whether or not something material might have
23 been left out of this film.

24 It was the focus of the Court of Appeals'
25 decision and the focus of my opponent below, at least

1 with regard to one of his arguments, that perhaps one of
2 the elements had not been proved by the affidavit.
3 Perhaps it could not even infer -- something, what they
4 were suggesting was something --

5 QUESTION: By the way, can you help me find
6 the affidavit?

7 MR. DeFRANKS: Yes. The affidavits we're
8 talking about are in the -- attached to the dissenting
9 opinion of the Court of Appeals. They would be at 825.

10 QUESTION: Thank you.

11 MR. DeFRANKS: As I was saying, the focus of
12 the Court of Appeals was that something might have been
13 left out in this case. We would submit that this
14 Court's decision in Franks versus Delaware operates as
15 the perfect safeguard for that type of complaint,
16 because under Franks he could have demonstrated that
17 something material had been left out, relative to one of
18 the elements of the crime. It would have forced a
19 viewing of the film, based upon his contention that
20 there was a reckless disregard for the truth.

21 It's interesting, in New York we have three
22 reviewing courts concerned with this case. No court, up
23 to this point, has ever seen the materials that are the
24 subject of this petition.

25 We submit that nothing in this case justifies

1 the elevated standard required by the Court of Appeals.
2 There was no prior restraint. There was no substantial
3 restraint. There was no mass seizure as is contended.
4 There was not even a violation of anyone's privacy
5 interest.

6 We submit that in light of those factors,
7 probable cause should be the standard, probable
8 obscenity, and we contend that the affidavits in this
9 case demonstrate probable obscenity as to the three
10 prongs of the Miller test.

11 First, the affidavits are introduced by the
12 statement, "The following describes the content and
13 character of the films." All the films are denominated
14 as adult films, indicative of their strong sexual
15 content.

16 From eight to 15 sexual acts found offensive
17 by any constitutional standard by the New York Court of
18 Appeals are described in these affidavits. The Court of
19 Appeals had no problem with respect to the second prong
20 of the Miller test.

21 Common sense indicates that where there are so
22 many acts performed in the course of a film, and that
23 these acts must consume a substantial period of time,
24 the film must have as its predominant appeal the
25 prurient interest in sex.

1 QUESTION: Well, the affidavits purport to
2 describe each scene in succession.

3 MR. DeFRANKS: Yes, they do, but there are
4 affidavits we are concerned with which do not go in
5 succession either. At one point the affiant says,
6 another scene rather than the following scene, et
7 cetera, Your Honor.

8 These films -- these affidavits, excuse me,
9 give not a single clue as to any redeeming literary,
10 artistic, political or scientific value, and indeed none
11 could be expected based on the predominance of the
12 sexual activity in the affidavits.

13 QUESTION: Mr. DeFranks, assume for a moment
14 that the warrant was not supported by probable cause
15 here. Is it clear from the record that the officers
16 acted in good faith in executing the warrant?

17 MR. DeFRANKS: Yes, it is.

18 QUESTION: Do you think then that, under the
19 Leon case, that the material could be seized in any
20 event?

21 MR. DeFRANKS: I would think that under Leon
22 this warrant and seizure would be upheld. My problem is
23 that the New York Court of Appeals has rejected the good
24 faith exception to the warrant requirement. Thus, if
25 the case were determined on a good faith basis and

1 remanded, I'd be a loser.

2 QUESTION: As a matter of state law?

3 MR. DeFRANKS: Yes. Given that the Magistrate
4 credited the assertions of the affiant in this case, and
5 there being no reason for anyone to suggest that
6 something was left out of these affidavits, I think it's
7 fair and it's reasonable to conclude that the films
8 demonstrated probable obscenity.

9 Lastly, in conclusion, I assert and we request
10 that affidavits be accepted as a legitimate basis upon
11 which to found a probable cause determination in an
12 obscenity case. Mandatory viewing of every frame of
13 every film would severely tax an already overladen
14 judiciary.

15 Further, the affidavits can be supplemented by
16 inquiry by the Judge. He can make inquiry of the
17 affiant.

18 This Court's determination that the review of
19 obscenity requires a focused search implies that there
20 should be interrogation, in fact, when the Magistrate
21 has some concern as to the sufficiency of the affidavits.

22 I think more importantly, though, the
23 existence of the safeguards to prevent substantial
24 restraint, in this case render reasonable the use of
25 affidavits to determine probable cause, in conclusion, I

1 ask this Court --

2 QUESTION: May I ask you a question.

3 MR. DeFRANKS: Yes, sir.

4 QUESTION: You are not asking us to review the
5 affidavits themselves to decide whether there is
6 probable cause, are you? As I understand the question
7 presented, the question is whether a matter of federal
8 constitutional law something more than probable cause is
9 required, and that is all you are asking us to decide?

10 MR. DeFRANKS: Well, I'm asking two things.
11 Number one, whether -- this Court to determine whether
12 or not an elevated standard has been imposed.

13 QUESTION: Supposing we read the Court of
14 Appeals' opinion, and I was looking at page A-7 right
15 after the footnote you refer to, and they are talking
16 about, probable cause can or cannot be inferred.

17 Supposing we read the opinion as just having
18 not applied an elevated standard of probable cause,
19 contrary to the dissent's view, that's one reading, what
20 would you ask us to do then?

21 MR. DeFRANKS: Well, I would ask that if it
22 were determined that the Court of Appeals was applying a
23 probable cause standard, and I don't believe that that's
24 the case, I would ask that you review the sufficiency of
25 the evidence here as you did in Gates.

1 QUESTION: You want us to review each of these
2 affidavits and then render an opinion on whether that's
3 probable cause?

4 MR. DeFRANKS: The same as you did in Gates,
5 make a legal determination as to their legal sufficiency.

6 QUESTION: As to each of these moves?

7 MR. DeFRANKS: As to each of these moves.

8 QUESTION: And what is it in the opinion --
9 could you tell me where you think the majority makes it
10 most clear that they are applying an elevated standard,
11 without regard to what the dissent says about it,
12 because sometimes I think it's a mistake to rely on
13 other opinions to interpret the majority.

14 MR. DeFRANKS: Well, first I would refer the
15 Court to page A-7 where they refer to their standard.
16 This would be footnote 3 at A-7. That's the majority
17 referring to the standard as being rejected unanimously.

18 QUESTION: That's referring to what the
19 dissent said. It said, dissent doesn't cite any -- but
20 is there anything in the text of the opinion that
21 supports your view that they have applied anything other
22 than a probable cause standard?

23 MR. DeFRANKS: All right. I would submit that
24 page -- the top paragraph of page A-7, the Court there
25 indicates that the affidavits are ambiguous, equivocal.

1 We submit that to determine probable cause there always
2 is going to be some equivocalness of the information
3 because we can't determine, at least to a prima facie
4 standard or to a proof beyond a reasonable doubt, that
5 the films are obscene.

6 QUESTION: Well, right after the footnote on
7 page 3, they say, "Probable cause cannot be inferred
8 from the title of an hour and a half long film, or from
9 the description of a few scenes." But they seem to be
10 trying to determine probable cause, which concerns me.

11 MR. DeFRANKS: As we suggest, they pay lip
12 service to probable cause and as the dissent --

13 QUESTION: You agree they do pay lip service
14 to the probable cause standard?

15 MR. DeFRANKS: Yes.

16 QUESTION: But you say they misapplied that?

17 MR. DeFRANKS: Yes. As the dissenter points
18 out, they were asking for an unequivocal demonstration
19 of obscenity to establish probable cause to believe that
20 the material was obscene.

21 QUESTION: Well, you say that, but their
22 opinion doesn't say they're asking for an unequivocal
23 demonstration of obscenity, does it?

24 MR. DeFRANKS: No, but I think that the
25 statement at page A-7 can be interpreted as saying, it

1 must be unambiguous. They criticized our affidavits for
2 being ambiguous. The result is that they must be
3 demanding unambiguous affidavits.

4 QUESTION: Well, you say from the sentence in
5 A-7, that they are interpreting the affidavit in the way
6 least damaging to the defendant

7 MR. DeFRANKS: Yes.

8 QUESTION: I mean, that is not a proper
9 application, or that's not the proper --

10 MR. DeFRANKS: In avoiding what this Court has
11 said about deference to the Magistrate.

12 In conclusion, I would urge that this Court
13 recognize that there was no mass seizure here and that
14 probable obscenity is the standard, that therefore the
15 decision of the Court of Appeals be reversed.

16 CHIEF JUSTICE BURGER: Mr. Cambria.

17 ORAL ARGUMENT OF PAUL JOHN CAMBRIA, JR., ESQ.

18 ON BEHALF OF THE RESPONDENT

19 MR. CAMBRIA: Mr. Chief Justice, and may it
20 please the Court:

21 I believe that the decision below is simply a
22 reflection, first of all, of the Court's interpretation
23 of its own rules. As you'll notice when you read their
24 decision, they rely substantially upon decisions of the
25 New York State Court of Appeals, and they discuss, and I

1 think in line with Maryland v. Macon, they discuss the
2 federal cases as guidance and they take the federal law
3 of Roaden and Lee and so on from the standpoint of
4 saying that there has to be a presumption of protection
5 under the First Amendment, that there is a higher hurdle
6 that must be achieved when we're analyzing this kind of
7 material, but basically the bedrock of this decision is
8 state law.

9 And in answering Mr. DeFranks, he says that
10 they do not, the majority, answer the dissent, and the
11 dissent cites no authority, they cite no state
12 authority. They rely from time to time upon federal
13 cases which I think, when you analyze them, we determine
14 just how low and how easy it has become throughout all
15 these federal jurisdictions to obtain a warrant, to stop
16 a publication which happens naturally in every case
17 where a search warrant is issued. There is a chill that
18 occurs.

19 I think that the language of the Chief Justice
20 in the Roaden case, and speaking on behalf of the Court
21 indicating that when you take a film it's the equivalent
22 of taking a number of books and magazines, and that
23 holds true here, and that's what's happened.

24 QUESTION: What was the chill here, in your
25 view?

1 MR. DeFRANKS: The chill here, Your Honor, is
2 the fact that once a -- this is not, first of all, an
3 adult bookstore. This is not a yellow front bookstore.
4 This is a place where films are rented to the public
5 from Stagecoach and Citizen Kane, all the way to some of
6 the films that are listed here in this piece of
7 litigation.

8 And so, when someone is given a search warrant
9 and they take not simply one copy for evidentiary
10 purposes but all the copies that they could find, and in
11 this case you'll see and the record shows that they took
12 two copies when they found two copies, and they took one
13 copy when they found one copy, and the police had
14 already copied themselves all of these tapes prior to
15 the time they executed their search warrant.

16 They had to reason to take these particular
17 tapes if they were simply interested in evidence versus
18 interested in something beyond evidence which would
19 necessitate them taking all the copies that were
20 available.

21 QUESTION: Mr. Cambria, was this point
22 addressed by the New York Court of Appeals?

23 MR. CAMBRIA: The New York Court of Appeals,
24 to my recollection, did not specifically address how
25 many numbers of copies were taken.

1 QUESTION: Did they unspecifically address the
2 question?

3 MR. CAMBRIA: Pardon me?

4 QUESTION: Did they unspecifically address the
5 question?

6 MR. CAMBRIA: Only in reciting what had
7 happened and what was taken.

8 QUESTION: Did you make this argument to the
9 New York Court of Appeals?

10 MR. CAMBRIA: We did not make an argument, a
11 prior adversary hearing argument, because we don't
12 believe that prior adversary hearing is -- this isn't
13 the Heller case, I submit, because in Heller this Court
14 didn't do away with the necessity of the scrupulous
15 exactitude. It just said that once the Magistrate has
16 been satisfied and once the higher hurdle has been
17 achieved, if you accomplish a mass seizure then you must
18 give a post-seizure hearing.

19 But, it doesn't do away with the initial step
20 which requires the scrutiny, and what this Court said
21 below is that, we think there are three parts to the
22 test. There isn't just one part. And this particular
23 police officer concerned himself -- and frankly he
24 wasn't a police officer, he was someone from the
25 District Attorney's office, he concerned himself only

1 with attempting to describe the sexual conduct part, the
2 second part of the Miller test.

3 He did nothing to address the other two parts
4 of the test, and I think that this Court --

5 QUESTION: Well, under Illinois versus Gates,
6 doesn't the Court ordinarily defer to reasonable
7 inferences drawn by the issuing magistrate, even though
8 they aren't the only inferences that might be drawn?

9 MR. CAMBRIA: I think the two things, yes, I
10 think that under Illinois versus Gates that is a fair
11 reading of the opinion there. Secondly, that has not
12 yet been applied in the State of New York and I reaffirm
13 the fact that we have --

14 QUESTION: So, it's your position that we just
15 shouldn't apply the Illinois versus Gates standards of
16 reviewing what the Magistrate did, is that your position?

17 MR. CAMBRIA: Yes, and particularly in this
18 First Amendment area. If these cases mean anything,
19 that were decided by this Court over a long stretch of
20 our history, saying, "scrupulous exactitude," and
21 "higher hurdle" and "focus searchingly on the question"
22 and so on, all of those words, if they mean anything
23 then it seems to me that what we don't do is, we don't
24 fill in the blanks and assume that the other two prongs
25 exist, as this Court last term was not willing to fill

1 in the blanks in the Spokane Arcade case.

2 There the argument was made on behalf of the
3 Government that prongs B and C supply -- or the test
4 that was given there in Washington -- supply prong A,
5 and that fills the bill, and this Court took the
6 position that -- I think I'm accurately reflecting it --
7 that they're separate, that they're independent, that
8 you can't have one slosh over, if you will, onto the
9 other.

10 And what the Court below said was, and I
11 submit this is the most important part of it, you must
12 pay attention and deference to all three parts of the
13 test.

14 Now, when we look at this affidavit, this
15 particular investigator from the District Attorney's
16 office never even claims that he read the obscenity
17 statute, that he even knew that there were three parts
18 to it, that he even appreciated that there was more than
19 one --

20 QUESTION: What difference does that make on
21 the question of issuing a warrant?

22 MR. DeFRANKS: I think it makes this
23 difference, if I might, Mr. Chief Justice. If the
24 Government here takes the position that *Franks v.*
25 *Delaware* applies, which I submit it doesn't, then in

1 order to achieve a hearing under that issue, under
2 Franks v. Delaware, don't I have to show that there's a
3 reckless disregard for the truth or that there's an
4 intentional misstatement of the facts?

5 Now, if I'm in a position where they have a
6 person who goes in, who doesn't even recite in his
7 affidavit that he's familiar with the fact that there
8 are three prongs to statute, then how can I attribute to
9 that individual the reckless disregard for sensitivity
10 to the three prongs, or an intentional statement on the
11 part of that individual that they left out information
12 which would have borne upon the other two prongs of the
13 test?

14 QUESTION: Well, all of the things you're
15 saying there, of course, are very important, in a very
16 important way on the ultimate decision, but how do they
17 bear on whether a warrant should issue?

18 MR. CAMBRIA: I think that when we make a
19 decision about probable cause, and I hope the history of
20 the Court bears me out -- I know it does with regard to
21 the State Court decisions -- that all of the elements
22 must be satisfied in some preliminary fashion.

23 QUESTION: There isn't in the record -- the
24 record doesn't show what the Magistrate thought, does it?

25 MR. CAMBRIA: Well, yes, it does, and I'll say

1 how it does.

2 QUESTION: What does he say?

3 MR. CAMBRIA: Under 690.40 of our New York
4 procedures, any communication whatsoever beyond the
5 papers is and must be recorded. There was no such
6 communication on this case.

7 QUESTION: It may not, but you're not
8 suggesting that the Magistrate didn't know about what
9 the cases required?

10 MR. CAMBRIA: But the Magistrate never
11 reviewed any of the materials, Your Honor. That's the
12 problem. The Magistrate, I think --

13 QUESTION: The Magistrate read the affidavit
14 and let's assume the Magistrate said, I know all about
15 these three prongs and I've read all these affidavits
16 and I infer that all -- there's probable cause to
17 believe that all three prongs are satisfied.

18 MR. CAMBRIA: I think that that's precisely
19 what --

20 QUESTION: We must assume that's what -- that
21 he did that, at the minimum.

22 MR. CAMBRIA: I think, as it comes up here,
23 that assumption comes with it. As we see the Court of
24 Appeals' analysis of it, the Court of Appeals said,
25 there is no basis for you to do that, interpreting our

1 cases which require a full and searching inquiry, using
2 the words of the Court of Appeals, and are measured in
3 comprehensive exam, we say that there was something more
4 that had to be done, that at best, at best these
5 affidavits could be described as ambiguous, and the
6 Court said, the Magistrate should have taken that extra
7 step.

8 And what I'm suggesting to this Court is, this
9 case is not --

10 QUESTION: The State Court did decide this as
11 a federal question, didn't it?

12 MR. CAMBRIA: Pardon me?

13 QUESTION: This was decided as a federal
14 question?

15 MR. CAMBRIA: I don't believe that that's so,
16 Your Honor. I believe that when you analyze this
17 decision, that this case is one State Court decision
18 after another that does not have to rely upon, and does
19 not rely upon federal precedent in order to be
20 self-standing.

21 QUESTION: Well, we just shouldn't ever have
22 granted this?

23 MR. CAMBRIA: I agree, and I said that in my
24 petition, in my opposition to the petition, because when
25 you look at this case and you look at the main cases,

1 the Podbora case, it relies on another New York State
2 case and that New York State case chronicles all the
3 state decisions. And when you look at the opening
4 salvos, the state Constitution is involved, all the
5 state cases are discussed, and those are the things that
6 the Court dwells on, the Court of Appeals.

7 They don't dwell on the federal cases and say
8 that it's a federal standard. They use the language of
9 their own cases and they say it's a state standard.

10 And, I think what the problem is, is when the
11 court found there was an ambiguity here, and the
12 ambiguity was because there was no addressing of the
13 other two prongs of the test, and they said that in this
14 particular very important area where we've used all
15 these words, that they don't consider platitudes like
16 "scrupulous exactitude" and so on, that in this area we
17 can assume and conjecture the various elements, that --
18 I am sorry.

19 QUESTION: Where is the clearer statement in
20 the case which we require to go off on the adequate and
21 independent state grounds, in light of the Court's
22 language dealing with application of the Fourth
23 Amendment in the citation of Roaden, Marcus versus the
24 search warrant, Stanford versus Texas, Maryland versus
25 Macon?

1 There is no clear and plain statement that the
2 Court was relying on state law.

3 MR. CAMBRIA: I think that when we analyze the
4 decision at A-4 of the record, they start off by talking
5 about it in parallel terms. They say, New York
6 Constitution, Article 1, Section 12, they cite that
7 first. They then go on to the Fourth Amendment.

8 They talk about reasonable cause under
9 Article--

10 QUESTION: It certainly doesn't meet the
11 Michigan versus Long standard by any stretch.

12 MR. CAMBRIA: Well, I think that it meets it
13 in this sense. I think that Michigan versus Long says,
14 and later on decisions of this Court, Upton, in the
15 concurrence in Upton, indicated that it would be better,
16 and there should be a definitive statement, so a lot of
17 time is not wasted by reviews back and forth.

18 But I don't believe that this Court said that
19 if, in fact, the State Court does not specifically make
20 a statement but makes it quite clear from their
21 determination that the federal cases are guideposts and
22 benchmarks but not what they're relying on in making the
23 decision. They really use the federal cases for
24 propositions such as, items are presumptively protected,
25 or there's a higher standard for books than there are

1 for weapons.

2 QUESTION: Take a look at A-4 and A-5, Mr.
3 Cambria, the sentence beginning in the -- it says,
4 "Thus, in applying the Fourth Amendment to such items
5 the Court must act with 'scrupulous exactitude,'" and it
6 cites Stanford versus Texas, a case from this Court, see
7 also Maryland versus Macon, a case from this Court.

8 MR. CAMBRIA: Yes, I think that that's true in
9 connection with that general principle which no one
10 disagrees with, I hope, that there must be scrupulous
11 exactitude. But in fashioning what the Magistrate's
12 duty is down below they rely specifically and only on
13 the New York State cases.

14 They say here, and the nub of the decision is,
15 the Magistrate below, given all the platitudes of
16 scrupulous exactitude and other things, the Magistrate
17 below should have gotten involved. It could have been
18 the simplest thing, simply ask a question. Would it be
19 too much to ask that we had a procedure where the
20 Magistrate simply said to the police officer, did you
21 leave anything out? Was there dialogue? Was there a
22 story? I mean, a few pointed questions like that.

23 Affidavits would be sufficient. There
24 wouldn't be any bogging down of the warrant process. It
25 would just be true to the New York State precedent by

1 saying, you've got to get involved, we can't just assume
2 that these points are established. We can't assume that
3 these other facts will be established.

4 Because, really, when you look at the
5 three-part test of Miller, the most important and the
6 most difficult parts, R-A and R-C, the middle part is
7 the easiest part.

8 QUESTION: Well, was the Miller case concerned
9 with the issuance of a warrant, or was it concerned with
10 the merits?

11 MR. CAMBRIA: Well, I think that we have to
12 define what it is and what happened here is --
13 forgetting the Miller case, taking the statute which the
14 Court refers to, 235, it incorporates the definition of
15 Miller.

16 QUESTION: All the things you were referring
17 to from the Miller holding had to do with decision on
18 the merits of the case, had nothing to do with the
19 warrants, isn't that so?

20 MR. CAMBRIA: If we look at -- well, I think
21 that interprets that statutes and you have to have --
22 when you're finding probable cause you have to start
23 somewhere and I submit, Mr. Chief Justice, you must
24 start with the statute and say, what are the elements
25 that I as a judge am attempting to find probable cause

1 to issue a warrant for.

2 And once you do that, you say there are three,
3 and in this case I'm submitting that the court below is
4 recognizing the two most important elements are the
5 first one and the last one. Everybody can describe the
6 sexual conduct. That's easy. But where the judge is the
7 most important critical factor is analyzing the
8 pruriency part and analyzing the value part, and we see
9 that when we look at our case.

10 I cited for the Court --

11 QUESTION: Tell me, Mr. Cambria, do you think
12 that it was the Magistrate's duty to see the motion
13 pictures?

14 MR. CAMBRIA: I -- the Court of Appeals, of
15 course, says no. The Court of Appeals says they can go
16 on affidavits but they must get involved affirmatively.

17 QUESTION: And you agree to that?

18 MR. CAMBRIA: I believe that in exigent
19 circumstances that that could be a substitute which
20 would be available to the Court, meaning in the sense
21 that --

22 QUESTION: Well, ordinarily do you think the
23 Magistrate should see the films?

24 MR. CAMBRIA: I think that the Magistrate
25 should review the film. That's the way that the

1 citizenry of our country --

2 QUESTION: He has to do that before he decides
3 whether to issue the warrant?

4 MR. CAMBRIA: I say yes, because I think
5 that's the best way, and in this case it was easy. They
6 had --

7 QUESTION: If this were a federal issue, is
8 there any case of ours that says that?

9 MR. CAMBRIA: There's no case which says
10 that. It was left open in Lee Art, and it's been talked
11 about a number of times in other cases but there's no
12 case that I know of from this Court that says that you
13 must see the film.

14 As far as I can determine the circuits are
15 everywhere, in the sense that if we look at a catalogue
16 of what some of the circuits have done as far as
17 sufficiency of warrants -- I mean, we can find the Fifth
18 Circuit, for example, saying -- and the Second Circuit
19 saying that a simple picture and a few words description
20 uttered by a police officer in an affidavit is enough to
21 issue a search warrant.

22 Now, I submit that absolutely in no way takes
23 into account the first and the third prong of the test,
24 and I'm not saying there should be guilt or innocence,
25 it shouldn't be a screenplay attached to the warrant,

1 shouldn't be any of those things. But we must in some
2 way discuss these prongs because they are part of the
3 offense involved, and in addition to that if we're going
4 to be true to all these statements we've made about the
5 higher hurdle which must be achieved, or the scrupulous
6 exactitude, then what does it mean if it can be
7 satisfied by simply saying, there is a picture, I saw
8 it, it shows this sexual conduct, and there was a brief
9 description on the box and therefore the warrant should
10 be issued.

11 I submit that what this case below has meant,
12 what it does mean, is that it's the procedure which is
13 important. If we take this procedure and we applied it
14 to Tropic of Cancer or Capricorn, and I made reference
15 to this in my brief, if we took this procedure and
16 applied it to that, we could take the language that you
17 find at page 145 of the decision written by the Ninth
18 Circuit Court of Appeals in Capricorn and Tropic of
19 Cancer, and in that case the words of the Judge were
20 that, "Practically everything that the world loosely
21 regards as sin is detailed in vivid, lurid, salacious
22 language of smut, prostitution and dirt, and all of it
23 is related without the slightest expression of an idea
24 of abandonment, consistent with the general tenor of the
25 book even human excrement is dwelt upon in the dirtiest

1 words. The author conducts the reader through sex
2 orgies and perversions of sex organs and always in the
3 base language of the bawdy house. Nothing has the grace
4 of purity or goodness."

5 I submit that this -- that the cases that we
6 cited in our brief, talking about the low threshold
7 that's emanated because of no stringent decision that
8 there ought to be in this area, would take that language
9 which was written by a federal judge in the Ninth
10 Circuit and would say that that was enough of a
11 description of Tropic of Cancer and Capricorn, Henry
12 Miller novels which are all accepted now, to make them
13 the subject of a search warrant for purposes of
14 scrutinizing them with regard to obscenity.

15 It would be the same way if we paid no
16 deference to the first and third prongs of the test, if
17 I were to review Hair or one of the other accepted
18 Broadway plays and just describe the sexual conduct that
19 I saw with no reference to the music, no reference to
20 the story line or the political satire, we'd be in the
21 exact same position and I submit that a judge, following
22 this laid-back approach, this lax approach, could simply
23 issue a warrant, and where would I be under a Franks
24 versus Delaware argument to say that the person who
25 reviewed Hair, for example, didn't read the obscenity

1 statute, never declared that they did.

2 Usually officers in their affidavits may say
3 they have a background, if they're in drug work and
4 they're asking for a search warrant with regard to
5 drugs, they iterate that they had some kind of
6 experience in the past so that you'd have some way of
7 putting what they say into context.

8 We don't have that here, and if I gave you an
9 affidavit from Hair, untaught as --

10 QUESTION: Let's take --

11 MR. CAMBRIA: Your Honor?

12 QUESTION: A different kind of case. A police
13 officer comes in and says, "I saw Joe Blow shoot and
14 kill John Jones and I want a warrant for his arrest."
15 Is that not --

16 MR. CAMBRIA: I submit that would be enough
17 for two reasons.

18 QUESTION: Doesn't have to do anything about
19 -- doesn't have to do anything at all about the merits.

20 MR. CAMBRIA: Right.

21 QUESTION: And that's sufficient?

22 MR. CAMBRIA: Right, and that would be enough
23 because, number one, he would have hit all the elements
24 of murder, and secondly --

25 QUESTION: I beg your pardon. He didn't say

1 "premeditated."

2 MP. CAMBRIA: I think that the simple taking
3 of life would have enough to show a violation of at
4 least New York law.

5 QUESTION: Why would not simple obscenity be
6 enough?

7 MR. CAMBRIA: Because the difference is,
8 there's no First Amendment which presumptively protects
9 murder. There is a First Amendment which -- and in
10 Article 1, Section 12, which presumptively protects
11 these publications which to, use the words of Roaden,
12 are arguably --

13 QUESTION: Have you anything else to go along
14 with that?

15 MR. CAMBRIA: Pardon me?

16 QUESTION: Have you anything else to go along
17 with that?

18 MR. CAMBRIA: I think I have all of these
19 decisions that indicate that there must be the
20 determination by the Magistrate and that the Magistrate
21 has to make the finding and the determination through a
22 higher hurdle, through a scrupulous exactitude, through
23 a searching, focused inquiry, and I submit that that's
24 the difference here.

25 QUESTION: And that's only true for First

1 Amendment?

2 MR. CAMBRIA: I believe that that's true, and
3 I believe that this Court has said that that's true.

4 QUESTION: What if you murdered an author,
5 would that involve --

6 MR. CAMBRIA: Excuse me.

7 QUESTION: If you murdered an author, would
8 that involve a First Amendment --

9 MR. CAMBRIA: I suppose that if you were a
10 district attorney and you murdered an author because you
11 were trying to silence what he was writing at the time,
12 that that could be a First Amendment matter and we could
13 have an argument with regard to it.

14 If I might, in summing this up --

15 QUESTION: May I ask you a question before you
16 sum up, Mr. Cambria.

17 MR. CAMBRIA: Yes.

18 QUESTION: Because the question presented in
19 the cert petition, I'm trying to figure out some way
20 where I don't have to decide whether there's probable
21 cause in all these affidavits, because that doesn't seem
22 to me to be something I should have to do in a case like
23 this.

24 Do you agree the issue is just what standards
25 should be applied in reviewing the affidavits that we

1 have to decide under the questions presented, and if so,
2 do you think the Court of Appeals applied -- required
3 more than a showing of probable cause?

4 MR. CAMBRIA: I think that the question here
5 is, under New York State, as they perceive their laws,
6 their statutes, their laws, their cases, did the Judge
7 here, given these facts, have a sufficient basis to try
8 to make a probable cause determination and only a
9 probable cause determination.

10 The Court says on page A-5, consistent with
11 these rules, the task of the issuing Magistrate in this
12 case was not to decide guilt or innocence but to
13 determine in a preliminary way from the information
14 submitted and available to him, whether there was
15 probable cause to believe that the material to be seized
16 was obscene within the tripartite definition of the
17 statute.

18 QUESTION: I recognize that, but what about
19 the sentence at the bottom of A-4, because there was
20 seizure based upon ideas, that was based upon ideas,
21 they contain -- there is a higher standard for
22 evaluation of a warrant application seeking to seize
23 such things as books and films as opposed to --

24 MR. CAMBRIA: I think what that means is
25 this: as this Court said in Roaden and Heller and Lee

1 Art and all the cases we've talked about today, there's
2 a higher standard in a sense that the judge must focus
3 searchingly on the question of obscenity, and even this
4 Court used the word, on the question of obscenity, in
5 Marcus, as opposed to probable obscenity.

6 So, what we're saying, I think is wat we've
7 said in all these First Amendment -- all these search
8 and seizure cases that the Court has decided. There is
9 a higher hurdle in the sense of analyzing probable
10 cause, because we do require this scrupulous exactitude
11 and we do require it at the seizure stage. That's the
12 only time the judge would be involved. Other than that,
13 we'd have a decision on the merits.

14 So, Roaden and Lee and all those cases which
15 dealt with search and seizure couldn't have meant
16 anything else except that in restraining the material ex
17 parte which is what happened by the search warrant,
18 there must be a higher hurdle, not guilt or innocence
19 but a higher hurile in how you evaluate probable cause.
20 So that it must --

21 QUESTION: You rely on Roaden, and my
22 recollection of that case is that there was no warrant
23 involved. They arrested the theater owner and took the
24 film with them.

25 MR. CAMBRIA: That's true. I say Roaden --

1 QUESTION: That case is --

2 MR. CAMBRIA: Well, I take this position --

3 QUESTION: -- several times --

4 MR. CAMBRIA: Roaden, in the sense that Roaden
5 seems to chronicle all the cases in this area, because
6 Roaden takes us back to Marcus and says we have a higher
7 hurdle. It then talks about Lee Art Theater which was a
8 case with a warrant where there was a perfunctory or a
9 conclusory showing, and so it's really a number of cases
10 all together, and in New York it's a whole number of
11 separate cases all together.

12 Roaden didn't have a warrant but Lee Art had a
13 warrant. Marcus had a warrant. A Quantity of Books had
14 a warrant. Heller had a warrant. And in all of those
15 cases the Court always said that in this preliminary
16 warrant procedure we must have this higher hurdle, and
17 that's all the Court was saying below, was that we must
18 have this higher procedure not to establish guilt or
19 innocence but have the Magistrate make the findings and
20 have an adequate basis to make the findings, and I
21 believe that's all they're saying.

22 They're not saying, we've got to try the case
23 before we ever have a trial, in essence, that we do it.
24 And the procedure that they suggest here is not
25 elaborate. It's not cumbersome. It's simply, if you're

1 going to rely on affidavits as an issuing magistrate,
2 get involved. Ask some questions when there are
3 ambiguities, under our state log of cases. Ask some
4 questions. It's as simple as that.

5 I think we're entitled to that.

6 QUESTION: May I ask you another question that
7 puzzles me about this litigation. I wonder what you
8 accomplish by your Motion to Suppress. Supposing you
9 won your Motion to Suppress and they suppressed the
10 stuff pursuant to a warrant, and then you still go to
11 trial.

12 Can't they just go rent the movie and put it
13 in evidence?

14 MR. CAMBRIA: I -- when we made that argument
15 below, the response was that there would be some
16 evidentiary objections. I don't have any idea --

17 QUESTION: Respondent -- these people who made
18 up the affidavit know what the movies are, and I guess
19 they're on the market. I don't understand why you have
20 to have such a big fight to suppress this stuff.

21 MR. CAMBRIA: Well, the problem --

22 QUESTION: From either side, I mean, I don't
23 know what you gained.

24 MR. CAMBRIA: What we gained is this: the
25 minute that that warrant hits that store, which again is

1 not the yellow front store, that sends a chill up the
2 spine of those individuals that's heard from coast to
3 coast, and I mean that with all sincerity, because each
4 time this warrant hits a store and some presumptively
5 protected material is taken off the shelf pursuant to
6 the warrant, that constitutes a chill which every one of
7 us --

8 QUESTION: Would it be as much of a chill as
9 being found guilty on the basis of -- I assume some of
10 it --

11 MR. CAMBRIA: Your Honor, that issue was
12 brought up in the Hair case, Southeastern Promotions,
13 and of course this Court found there that the punishment
14 after the crime such as in penal law situations is one
15 thing, but punishment pre-crime which is the restraint
16 situation is something more onerous, and I take the
17 position that it is.

18 And I submit what happens is, this procedure is
19 important to us, and it's very important as to how it
20 affects not just these books, magazines, films, what
21 have you, but all the others, the Tropic of Cancers of
22 tomorrow, the Hairs and other cases of tomorrow. How
23 low can the threshold be, is what it amounts to.

24 In New York this Court has said that the
25 Magistrate should be involved. There should be this

1 focused inquiry and so on. I submit that's fair, it's
2 reasonable, and we're all entitled to it, and I ask you
3 to affirm the decision below based upon the fact that we
4 are entitled to that much since it will not stifle the
5 criminal process.

6 It will not in any way hamper prosecutions.
7 It will simply protect us from overzealous individuals
8 who come forth with warrants based upon applications
9 like these where the Magistrate clearly was not involved
10 and wasn't true to the New York State decisions that
11 he's mandated to be bound by.

12 I thank you very much.

13 CHIEF JUSTICE BURGER: Mr. DeFranks.

14 ORAL ARGUMENT OF JOHN J. DeFRANKS

15 ON BEHALF OF PETITIONER -- REBUTTAL

16 MR. DeFRANKS: I would like to just make one
17 point, with regard to Franks versus Delaware. If the
18 affiant were to leave out the music of Hair, the dancing
19 of another particular film, that would qualify as a
20 reckless disregard, he couldn't be faithful to a
21 performance and leave out something like that, and
22 that's the way the third prong is proven, by omission.

23 Even when the Magistrate reviews the film
24 there's nothing that lights up the screen and says there
25 are are no literary, artistic, political or scientific

1 values. It's one that's done by omission.

2 QUESTION: Mr. Attorney General, why didn't
3 you buy a copy of this and renew -- re-open the case
4 rather than bothering us with it?

5 MR. DeFRANKS: Well, they weren't all
6 firsthand.

7 QUESTION: You didn't have --

8 MR. DeFRANKS: They were -- having rented it
9 and not returned it during a certain period, that might
10 well be considered a seizure had we not returned it
11 pursuant to the rental agreement, seizure without a
12 warrant.

13 QUESTION: Well, couldn't you have rented it
14 long enough to copy it?

15 MR. DeFRANKS: We could have rented it long
16 enough to copy it, yes, we could have.

17 QUESTION: In fact, he says you did that, is
18 that right?

19 QUESTION: And saved us all this trouble.

20 MR. DeFRANKS: We did rent certain of them and
21 copied certain of them, yes.

22 QUESTION: If you had the copies, then why did
23 you have to fight about the suppression?

24 MR. DeFRANKS: Because the actual films were
25 the best evidence in this case to present to the jury.

1 We would have had to then --

2 QUESTION: The copies were not legible, is
3 that what it is?

4 MR. DeFRANKS: Well, they would have had to
5 have been verified. It was just to eliminate --

6 QUESTION: Do you think it's harder to verify
7 copies than to come to the United States Supreme Court
8 on an issue?

9 MR. DeFRANKS: No, but there was also more of
10 an impact on the jury to show them the actual films that
11 were taken from the store. These were the films which
12 were the subject of the promotion charge.

13 QUESTION: Is it correct that the only purpose
14 of the seizure was for use as evidence? There was no
15 attempt to try to discourage the business before there
16 was a trial on the merits?

17 MR. DeFRANKS: Not at all.

18 QUESTION: Not at all?

19 MR. DeFRANKS: No attempt.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.
21 The case is submitted.

22 (Whereupon, at 11:51 a.m., the case in the
23 above entitled matter was submitted.)

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-363 - NEW YORK, Petitioner V. P.J. VIDEO, INC., dba NETWORK

VIDEO, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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